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October 28, 2004

**VIA ELECTRONIC FILING AND HAND DELIVERY**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: WC Docket No. 04-313, Access to Confidential Materials, Response to  
Verizon Late-Filed Objection

Dear Ms. Dortch:

On behalf of The Loop and Transport CLEC Coalition ("Coalition"), I am responding to the objection lodged by counsel for The Verizon Telephone Companies ("Verizon")<sup>1</sup> seeking to bar two employees of Coalition members from obtaining access to information that Verizon has designated as confidential pursuant to the Protective Order entered in this proceeding.<sup>2</sup>

Verizon's objections are not timely, and thus its right to object has been waived. The objections were sent October 21, 2004. Yet the Coalition filed the challenged Requests for Access to Confidential Materials on October 7, 2004.<sup>3</sup> See **Attachment 1**. The *Protective Order* provides, at most, only 3 business days for a party to object to a Request for Access:

When the Acknowledgment has been received by same-day (hand) or next-day delivery, any objection to disclosure must be filed at the Commission and served by same-day (hand) or next-day

<sup>1</sup> Letter from J.C. Rozendaal, Esq., to Marlene H. Dortch, Secretary, FCC (Oct. 21, 2004). By letter dated October 28, 2004, Verizon withdrew several of its objections, but continuing to lodge objections to two persons.

<sup>2</sup> *Access to Unbundled Network Elements*, WC Docket No. 04-313, Order, DA 04-3152 (Sept. 29, 2004) ("Protective Order").

<sup>3</sup> Letter from Stephanie A. Joyce, Esq., to Marlene H. Dortch, Secretary, FCC (Oct. 7, 2004).

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delivery on Counsel representing, retaining or employing such person *within two business days after receipt of that person's Acknowledgment*. In other cases, any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person *within three business days after receiving a copy of that person's Acknowledgment[.]*"

*Protective Order* ¶ 8 (emphasis added). Verizon's objections were due, at the latest, Tuesday, October 12, and are thus 9 days late.

The Requests were filed electronically, and counsel retained the proofs of filing. **See Attachment 2.** In accordance with Paragraph 8 of the Protective, Michael K. Kellogg, counsel for The Verizon Telephone Companies, was served via hand delivery on October 7, 2004. **See Attachment 3.** As the attached courier's log demonstrates, the filing was delivered October 7 to 1615 M Street, N.W. (the location of Verizon's outside counsel), where "J. Tanner" signed for the package. The Requests were also sent successfully by facsimile to Mr. Kellogg at 6:19 p.m. that day. **See Attachment 4.**

Verizon counsel contests service, but does not address or acknowledge that the Requests were hand delivered. First, counsel asserts that "[a]lthough Dee May of Verizon was on the service list for both letters, ... she has yet to receive the October 7 letter." This assertion is irrelevant. Paragraph 8 of the Protective Order states that parties requesting access to confidential information must execute the Acknowledgement of Confidentiality and "file it with the Bureau, on behalf of the Commission, and serve it upon each Submitting Party *through its Outside Counsel of Record* so that the Acknowledgment is received by each Submitting Party." Ms. May is not Verizon's outside counsel — she is employed by the company, as counsel concedes. Mr. Kellogg, by contrast, is widely known to be Verizon's outside counsel, and his firm has principally represented Verizon in this proceeding. Thus, the Coalition served the appropriate person with the Requests, and the fact that the United States mail may have reached Ms. May on October 19 or later is irrelevant.

Secondly, Verizon asserts that "[i]t does not appear that these letters were available on the Commission's Electronic Comment Filing System until October 20." Again, this assertion, even if true, does not permit Verizon to file objections 10 days late. The Coalition has the proof of hand delivery and facsimile service, as well as its proof of electronic filing from October 7, 2004.

It is thus clear that Verizon's objections are not timely, and should therefore be denied. It is a bedrock principle that those seeking tribunal protection of information must

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themselves demonstrate adequate caution in protecting that information.<sup>4</sup> Verizon, in neglecting its duties and filing objections 9 days late, has failed to demonstrate such caution.

Even if Verizon had followed the appropriate procedure and made a timely filing, its objections should be overruled. The persons seeking access to Verizon's information are entitled to review and analyze ILEC information in order to assist their companies in participating in this proceeding. Moreover, they have the right to know the topology of Verizon's network insofar as they are entitled to access portions of it — especially loops and transport — by Section 251 of the Telecommunications Act of 1996.

The persons to whom Verizon objects are:

- Anthony Abate, President and CTO, SNiP LiNK, LLC
- Paul Hanser, Senior Director, Net. Engineering, Eschelon Telecom, Inc.

The *Protective Order* states that persons who “are not involved in competitive decision-making” may obtain information designated as confidential.<sup>5</sup> More specifically, party employees who do not “participat[e] in any or all of the client's business decisions ***made in light of similar or corresponding information about a competitor***” fall within the Permissible Disclosure category.<sup>6</sup> The information that Verizon has deemed confidential would not be used by SNiP LiNK and Eschelon to perform “competitive decision-making” in the sense of attracting customers or developing advertising campaigns. Rather, it would be used in furtherance of obtaining the network access to which Section 251 entitles CLECs.

Mr. Abate was a declarant in this proceeding, and his declaration was filed with the Coalition's Initial Comments on October 4, 2004. His company, SNiP LiNK, operates primarily in Verizon territory. Mr. Abate thus requires access to Verizon's confidential information to the extent that the assertions that Verizon made regarding facilities deployment in its region required a response on behalf of SNiP LiNK. He is the only SNiP employee seeking access to materials in this case, and he is the chief participant in regulatory proceedings on SNiP's behalf.

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<sup>4</sup> “[S]ince the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.” 8 John H. Wigmore, *Evidence*, § 2325, at 633 (McNaughton rev. 1961). “If the holder delivers documents to a third person, he could claim this was ‘inadvertent’ only on the supposition that he did not bother to look at them before turning them over; but if he cares so little about his secrets, it is difficult to see why courts should come to his rescue when he realizes he should have been more careful.” 26A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5726, at 543 n. 75 (1992).

<sup>5</sup> *Protective Order* ¶ 2.

<sup>6</sup> *Id.* (emphasis added).

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Mr. Hanser is part of Eschelon's network engineering team. In that role, he oversees the operations of the facilities that Eschelon installs and leases. As such, he is aware of the extent to which Eschelon relies on ILEC facilities, both as unbundled network elements ("UNEs") and as Special Access. Mr. Hanser's review of Verizon's deployment statistics is necessary for Eschelon to verify their accuracy.

Mr. Hanser is not on the Eschelon Executive Council, which makes all decisions, competitive and otherwise, for the company. He therefore does not, as a matter of corporate policy, "participate in any or all" of Eschelon's decision-making. Nor is he part of Eschelon's marketing activities, sales efforts, or pricing decisions. He is not a customer service agent, or supervise such personnel.

To the extent that Mr. Hanser does not have the specific information disclosed by Verizon here, he is entitled to it. No ILEC, including Verizon, is permitted to hide from a competitor information about its facilities — certainly not the facilities that are subject to unbundling and access obligations. Accordingly, the information that Verizon has filed in this proceeding about its own network facilities should be made available to Mr. Hanser.

The Coalition further notes that neither Mr. Abate nor Mr. Hanser will obtain, absent permission, information deemed confidential by another CLEC. As the Commission may be aware, Verizon has adopted a unilateral practice in this proceeding whereby no CLEC will be provided confidential information that Verizon included in its comments if it regards another CLEC. Verizon applies this policy even to CLECs that are part of a coalition, for example The Loop and Transport CLEC Coalition of which Eschelon and SNiP LiNK are members. Verizon therefore should have no concern that they will be releasing information to Eschelon and SNiP LiNK about fellow CLECs. These personnel seek only information about Verizon.

Parties must be given adequate opportunity to participate in this case, and Verizon's attempts to shield crucial information from party employees, such as Mr. Abate and Mr. Hanser, robs them of this opportunity. This is true especially with regard to the information about Verizon's loop and transport deployment, which is the crux of the Commission's impairment analysis for CLECs operating in Verizon's territory.

This conclusion is not mitigated by the Commission's prior rulings on waiver of confidentiality. Verizon counsel cites to one order within the Bell Atlantic-GTE merger docket in which the Commission found that a late-filed objection to Sprint employees' access to confidential information did not constitute a waiver.<sup>7</sup> The Commission's decision in that case

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<sup>7</sup> *GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, CC Docket No. 98-184, Order Ruling on Joint Objections, DA 99-33, 14 FCC Rcd. 3364, 3365 n.6 (1999) ("Order on Objections").

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was predicated on the fact that barring Sprints' employees access to information would "not deprive Sprint of the opportunity to participate in this proceeding."<sup>8</sup> In this case, however, accepting Verizon's objections would indeed deprive two Coalition members of the 'opportunity to participate in this proceeding.'

Verizon has submitted many statistics and purported surveys in this record, all with the aim of proving that CLECs are not impaired without access to loop and transport facilities. The CLEC personnel that consider loop and transport alternatives on a daily basis must have access to that information, especially when that information is supposedly about them, to determine whether it is correct. Moreover, CLECs must be permitted to examine the statistics that Verizon has asserted regarding aggregate deployment in order to assess their validity. Because of the manner in which Verizon has shielded CLEC information in this proceeding, only by reviewing the aggregate sums can parties get a sense of what Verizon is attempting to demonstrate. Outside counsel are not sufficient for this task — network engineers and interconnection personnel have the expertise that is necessary. Thus, to block employee access to information is to prevent parties from participating in this proceeding. This conclusion is especially true as to SNiP LiNK, which has submitted a request only for Mr. Abate. Accordingly, Verizon's objections go too far, and do not comport with the Commission's 1999 *Order on Objections*.

In sum, Verizon's attempt to shield network information in this proceeding is both late and baseless. Indeed, even in attempting to excuse itself for filing 9 days late, Verizon fails to acknowledge a crucial, operative fact — that its principal law firm accepted courier service and facsimile service of the Requests for Access on October 7, 2004, when they were filed.

The Commission therefore should overrule Verizon's objections, and approve the Coalition's Request for Access to Confidential Materials filed in WC Docket No. 04-313 and CC Docket No. 01-338 on behalf of Anthony Abate and Paul Hanser.

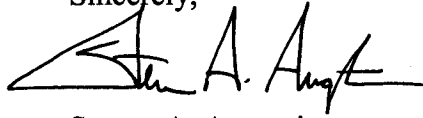
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<sup>8</sup> *Id.*

KELLEY DRYE & WARREN LLP

Marlene H. Dortch  
October 28, 2004  
Page Six

Sincerely,

A handwritten signature in dark ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a long, horizontal flourish at the end.

Steven A. Augustino

cc: Jeffrey Carlisle, Chief, Wireline Competition Bureau  
Russ Hanser, Wireline Competition Bureau  
J.C. Rozendaal, counsel for The Verizon Telephone Companies

# **ATTACHMENT 1**

**KELLEY DRYE & WARREN LLP**

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October 7, 2004

**ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338  
Access to Confidential Materials – Supplemental Request

Dear Ms. Dortch:

Pursuant to the Protective Order adopted in the above-referenced proceedings,<sup>1</sup> the Loop and Transport CLEC Coalition (comprised of Advanced Telecom, Inc., Birch Telecom, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., Grande Communications, Inc., KMC Telecom, Inc., SNiP LiNK, LLC, Talk America Inc., Xspedius Management Co. LLC, and XO Communications Inc.) hereby submits the attached copies of the Acknowledgements of Confidentiality (Appendix B to the Protective Order) signed by the following (the "Signatories"):

- Anthony Abate, President and CTO, SNiP LiNK, LLC;
- Joan Olson, Legal Assistant, Eschelon Telecom, Inc.;
- Paul Hanser, Senior Director, Net. Engineering, Eschelon Telecom, Inc.;
- Bonnie Johnson, Dir. of ILEC Relations, Eschelon Telecom, Inc.;

<sup>1</sup> *Unbundled Access to Network Elements*, Protective Order, 19 FCC Rcd 16292 at Appendix A (2004) ("Protective Order").



**KELLEY DRYE & WARREN LLP**

Marlene H. Dortch, Secretary  
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- Raymond Smith, Manager of ILEC Performance, Eschelon Telecom, Inc.
- Edward A. Yorkgitis, Jr., Partner, Kelley, Drye & Warren LLP; and
- Jennifer Lin, Legal Assistant, Kelley, Drye & Warren LLP

The Loop and Transport CLEC Coalition seeks access to confidential versions of documents filed in the above-referenced proceedings by BellSouth Corp., Qwest Communications International, Inc., SBC Communications Inc., the Verizon Telephone Companies, MCI, AT&T, and United States Telecom Association (the "Parties"), as well as all their respective affiliates and subsidiaries. All of the Signatories fall within the "Permissible Disclosure" categories described in paragraph 5 of the Protective Order.

As stated in the attached certificate of service, counsel for each party has been served, via First Class Mail and Facsimile, with a copy of this letter and the executed Acknowledgements of Confidentiality.

Due to the brief interval between the filing of comments and reply comments in this proceeding, The Loop and Transport CLEC Coalition requests that this letter toll the three business day waiting period established in paragraph 8 of the Protective Order so that the Signatories can have immediate access to the confidential material, if any, filed by the ILEC Parties. Any delay in the ability to review such confidential material would prejudice The Loop and Transport CLEC Coalition's ability to file timely reply comments.

In accordance with the Commission's rules, this letter is being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,



Stephanie A. Joyce, Esq.

Attachments – Acknowledgements of Confidentiality

cc: Attached Service List

**Federal Communications Commission****DA 04-3152****APPENDIX B****Acknowledgment of Confidentiality****CC Docket No. 01-338 & WC Docket No. 04-313**

I hereby acknowledge that I have received and read a copy of the Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents or Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 5 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Protective Order.

I hereby certify that I am not involved in "competitive decision-making" as that term is used in the definition of In-House Counsel in paragraph 2 of the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Confidential Documents and Confidential Information are used only as provided in the Protective Order; and (2) Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of paragraph 10 of the Protective Order. I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Stamped Confidential Documents or Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at Pennsauken, NJ this 6<sup>th</sup> day of October, 2004



Anthony Abate  
President and CTO  
SNiP LiNK, LLC.  
100-A Twinbridge Drive  
Pennsauken, NJ 08110

Federal Communications CommissionDA 04-3152**APPENDIX B****Acknowledgment of Confidentiality****CC Docket No. 01-338 & WC Docket No. 04-313**

I hereby acknowledge that I have received and read a copy of the Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents or Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

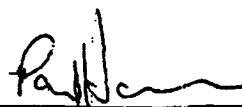
Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 5 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Protective Order.

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Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at Minneapolis, MN this 6 day of October, 2004



Paul Hanser  
Senior Director, Network Engineering  
Eschelon Telecom, Inc.  
730 2nd Avenue South, Ste. 1200  
Minneapolis, MN 55402  
(612) 436-6691

## **CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that on this 7<sup>th</sup> day of October, 2004, I caused to be served a true and correct copy of the foregoing letter and Acknowledgements of Confidentiality by First Class Mail, Facsimile\* and Electronic Mail\*\* to the following:

### **USTA**

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Mark L. Evans  
Sean A. Lev  
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### **FCC**

Russell Hanser \*\*  
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**Verizon and SBC**

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**BellSouth**

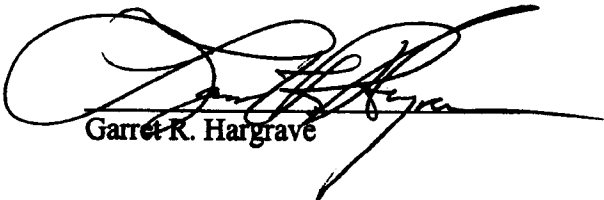
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Glenn T. Reynolds\*  
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**Qwest and Verizon**

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Fax: 202-663-6363

Melissa Newman\*  
Qwest  
607 14th St., N.W., Suite 950  
Washington, D.C. 20005  
Fax: 202-293-0561



Garret R. Hargrave

## **ATTACHMENT 2**

**Federal Communications Commission**

**The FCC Acknowledges Receipt of Comments From ...  
Advanced Telecom, Inc.; Birch Telecom, Inc.; Broadview  
Networks, Inc. et al.  
...and Thank You for Your Comments**

**Your Confirmation Number is: '2004107071797 '**

**Date Received: Oct 7 2004**

**Docket: 04-313**

**Number of Files Transmitted: 1**

**DISCLOSURE**

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## **ATTACHMENT 3**

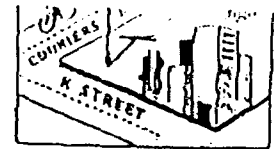


NAME KENNEDY  
 DATE 10/5/04  
 DAY Tuesday

#5  
 LOTS

K STREET COURIER  
 (202)466-1777

95519792



Wednesday 10/6/04

THURSDAY 10/7/04

THURSDAY 10/7/04

1	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1150	155+ N.W. Wash Post	Other			
	SIG.	Chandler	5:05				
2	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1333	45+ N.W. 5th	Other			
	SIG.	Gardiner	11:27				
3	PIU	933	15 St 937	Rush	Round Trip	Lbs.	Wait Time
	DEL.		CAR DRIVER	Other			
	SIG.	C- Driver					
4	PIU	1299	PENN N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	770	55+ N.W. 1st	Other			
	SIG.	Sherman					
5	PIU	1200	195+ N.W. 500	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1015	155+ N.W. 400	Other			
	SIG.	James					
6	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1150	155+ N.W. 1200m	Other			
	SIG.	M. BARKLEY					
	PIU	1200	19 St N.W. 600	Rush	Round Trip	Lbs.	Wait Time
	DEL.	441	45+ N.W. 810.5	Other			
	SIG.	Pennell/F E Lee					

8	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1150	155+ N.W. Wash Post	Other			
	SIG.	M. Barkley					
9	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1150	175+ N.W.	Other			
	SIG.	Goldman					
10	PIU	1100	175+ N.W. 401	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1150	155+ Wash Post	Other			
	SIG.	Jones H.					
11	PIU	1701	Q St N.W.	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1100	155+ N.W. 900	Other			
	SIG.	Gibert					
12	PIU	1701	Q St N.W.	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1500	K St 650	Other			
	SIG.	Cunningham					
13	PIU	1701	Q St N.W.	Rush	Round Trip	Lbs.	Wait Time
	DEL.	1399	New Y Ave 2nd	Other			
	SIG.	Sorrell					
14	PIU	1701	Q St N.W.	Rush	Round Trip	Lbs.	Wait Time
	DEL.	801	PENN N.W.	Other			
	SIG.	DAVIS					

3000

## **ATTACHMENT 4**

KELLEY DRYE & WARREN

JOB #607

DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001 10/07	6:19P	93267999	EC--S	03' 48"	012	OK

**KELLEY**  
**DRYE**

## FACSIMILE TRANSMISSION

TO	FAX	PHONE
Michael K. Kellogg Kellogg, Huber, Hanson, Todd & Evans PLLC	202-326-7999	

NO. OF PAGES 11 (including this page)  
DATE October 7, 2004

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1200 19TH STREET, N.W.  
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FAX (202) 955-9792

MESSAGE:

FROM Garret R. Hargrave  
PHONE (202) 887-1254  
E-MAIL ghargrave@kelleydrye.com  
TIMEKEEPER ID 05018  
CLIENT NO. 010172, 0005

NEW YORK, NY  
WASHINGTON, DC  
TYSONS CORNER, VA  
CHICAGO, IL  
STAMFORD, CT  
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